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SUBJECT: Senate Strikes Back Against Presidential Decree Authority

REFS: Brasilia 390, 07 Brasilia 921, 07 Brasilia 1745, 07 Brasilia 1991, 07 Brasilia 2233

¶1. (U) Summary. The days of "legislation by presidential decree" may be numbered, after the Senate President recently took the unprecedented step of returning a decree to President Lula, and both houses of Congress again focused on curtailing the President's ability to control the legislative agenda through provisional measures (medidas provisórias, MPs)(ref A). Legislators appear determined to amend the Constitution to put Congress on a more equal footing with the executive branch. If they are successful, a new set of rules for politics in Brazil will arise that will require more horse-trading and compromise from the executive branch. End summary.

¶2. (U) Until MP 446 hit the Senate in mid-November MPs were mainly only a favorite complaint in Congress: deputies and senators made passionate speeches against them, leaders agreed something had to change, but nothing dramatic happened. The current rules came into effect in 1989 with the new constitution, and all five presidents since have made generous use of MPs to control the legislative agenda. The executive branch issues hundreds of MPs a year to bring about federal action in a seemingly unlimited number of areas. MPs have the force of law on issuance, and Lula has used his majority in the Chamber of Deputies, and to a lesser extent the Senate, to turn Congress into a rubber stamp shop for actions that in many other democracies would have been accomplished through ordinary legislation. A shot across the bow changed everything on November ¶19.

¶3. (U) Senate President Garibaldi Alves Filho (Brazilian Democratic Movement Party - PMDB, a non-ideological party in the government coalition; of Rio Grande do Norte) surprised not only President Lula's administration but everybody in Congress by returning MP 446 to the executive branch due to the lack of "urgency and relevancy," the constitutional, but routinely ignored, requirements for MPs. The subject of MP 446, tax benefits and exemptions for philanthropic entities, was not especially significant in itself, but as it dealt with a subject that was obviously neither urgent nor particularly appropriate for an MP, it opened a window of opportunity for Alves. For the first time under this Constitution, the legislative branch had returned an MP to the executive branch.

Questions about Validity of Senate President's Action

¶4. (U) Nobody expected Alves, who became president of the Senate after the crisis that brought down Renan Calheiros (refs B, C, D, E) and was viewed as a back-bench Caspar Milquetoast with no inclination to use the limited powers of his office and was expected to leave no mark upon it, to fire the shot against President Lula's legislative urges. Alves took his own party by surprise when in a regular Senate session he announced he was taking the unprecedented

step of returning an MP to the executive. Some members complained, saying there was no supporting law, while others approved, but in the end the Senate seemed pleased at the first real response to Lula's pattern of dominating the congressional agenda.

15. (U) Senator Paulo Paim (Workers' Party - PT, the lead party in the ruling coalition; of Sao Paulo), a member of Lula's party and one of the legislators who co-drafted the 1988 Constitution, told our political assistant that MPs are simply a mistake and were not conceived to be used as they are now. Even he thinks they are being used indiscriminately and the Constitution needs to be changed. He told us that presidents have become accustomed to legislating through MPs, blocking the legislative branch from doing its job. The executive has gone as far as presenting MPs with the same language in bills under consideration so as to circumvent the normal legislative process; he said this has happened to some of his proposed bills. Paim has introduced a draft Constitutional amendment to change the rules governing the use of MPs.

16. (U) After Alves returned MP 446 to President Lula, the government leader, Senator Romero Juca (PMDB; of Roraima), asked the Senate Committee on the Constitution, Justice, and Citizenship (CCJ) to rule whether Alves's action was permissible, arguing that such a decision required a plenary vote by all senators. CCJ Chairman Marco Maciel (Democrats - DEM, opposition; of Pernambuco), opted not to jump into the fray, and said the Committee would not act until there was a political solution to the collision. In the meantime, MP 446 is considered valid, with the force of law, because of Juca's petition. So far, the real effect of Alves's action is null, but the symbolic effect is potentially huge.

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Presidential Behavior Modification?

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17. (U) In the beginning of December, the executive branch decided to not engage the Senate in a direct fight over the returned MP, but instead introduced a bill with the same text. This is arguably the first time Lula has backed off from legislating by decree, and suggests Alves succeeded in modifying the president's behavior, at least for now. At the same time, Alves has energized the debate in Congress over MPs. The CCJ has not decided on the constitutionality of Alves's action on MP 446, and the CCJ could even reject Juca's request for a ruling, which would probably have the effect of upholding Alves's action.

MPs under attack on other fronts

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18. (U) In the meantime, another player joined the fracas. On December 3, the Public Ministry, which operates independently from the other three branches of government, filed a petition against the MP before the federal judiciary stating that the MP is unconstitutional. This is tantamount to a direct attack by another branch of government against the executive's use of MPs. Then the president of the Chamber of Deputies, Arlindo Chinaglia (PT; of Sao Paulo), threw gasoline on the fire by stating that before analyzing any bill dealing with the same subject in MP 446, the Senate must decide whether Garibaldi's decision is valid or not. With one stroke, Chinaglia defeated the government's attempt to get around the problem by introducing a new bill on the same subject, which is, ironically, the opposite of what it usually does by issuing an MP to obviate the need for ordinary legislation.

Comment

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19. (U) The first act against the continuous stream of MPs from President Lula has already given Congress an appearance of more determination and strength. Returning an MP was Alves's way of telling Lula that it is not the role of the executive branch to legislate, and Lula seemed to get the message. Whether it will stick is uncertain. What is certain is that Garibaldi took a step toward changing the relationship between the executive and legislative branch, and Congress now seems readier than ever to

amend the constitution to change the rules. The most likely outcome is an amendment so that MPs will no longer "lock" the congressional agenda after 45 days, and new rules about how MPs are placed on the legislative agenda. But action against MPs should not be misconstrued as a move against President Lula, who is more popular than ever and has broad support in Congress, but rather it is an attempt by the legislative branch to reclaim sovereignty over its area of authority, and repair the imbalance of powers introduced in the 1988 Constitution.

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